

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in September 2012

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX

DEPARTMENT OF EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Classification; Job Duties; Pay Increase; Discrimination; Favoritism; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Echols II v. Department of Education</u> DOCKET NO. 2011-0418-DOE (9/25/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent acted arbitrarily and capriciously in assigning Grievant's salary.
<u>SUMMARY:</u>	<p>Grievant is employed as a Curriculum Development Technician, he contest his job title and salary. Grievant alleges he has been discriminated against in that he performs the same job duties, and is similarly situated, as an identified "Video Production Coordinator," but is prohibited from enjoying a compatible salary. Grievant avers that the difference in treatment has caused a substantial inequity in their salaries and there is not proper justification for this difference. Respondent disagrees.</p> <p>Respondent demonstrated that Grievant is not similarly situated to the comparative employee identified by Grievant. There are other WVDE employees at the "technician" level, the scope of Grievant's work is similar to the scope of work done by other WVDE technicians, and the scope of Grievant's work is substantially more limited than the work of an individual paid at the higher "coordinator" level salary. Respondent actions are not considered to be arbitrary and capricious. Grievant failed to establish, by a preponderance of the evidence, the necessary elements of his allegations. Grievant did not demonstrate a violation of any statute, rule, policy or procedure, or that he was otherwise entitled to the relief requested. Consequently, this grievance is DENIED.</p>

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HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Negligence; Job Duties; Failure to Produce; Annual Appointment; Administrative Contract
<u>CASE STYLE:</u>	<u>Bahu v. West Virginia University</u> DOCKET NO. 2011-1173-WVU (9/25/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent demonstrated that Grievant did not fulfill the obligations of his position at the level expected of him. Whether Grievant was termination for cause.
<u>SUMMARY:</u>	Grievant was employed as a Professional Technologist 3, an exempt, non-classified position, assigned to the Office of Admissions and Records. Grievant was assigned to the Office of University Registrar upon its creation. Grievant signed an Annual Notice of Appointment that had an end date of June 30, 2011. Grievant's employment was terminated pursuant to his repeated failure to produce accurate reports for various clients of the Office of Admissions and Records. Respondent demonstrated that Grievant did not fulfill the duties of his administrative position at the level expected of him. Respondent has met its burden of proving by a preponderance of the evidence that the termination of Grievant's employment was for cause.

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Arbitrary and Capricious; Qualifications; Abuse of Discretion; Second Set of Factors; Evaluations; Specialized Training; Tie; Interview
<u>CASE STYLE:</u>	<u>Morton v. Kanawha County Board of Education and Veronica Coleman, Intervenor</u> DOCKET NO. 2010-1540-KanED (9/10/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent probably applied the criteria specialized training and evaluations; and acted arbitrary and capriciously when using an interview to break the selection tie.
<u>SUMMARY:</u>	Grievant is employed as a substitute teacher by Respondent. She applied for a posted teaching position, and after application of the second set of factors set forth in the statute, she was tied with two other applicants in the number of points in the seven statutory criteria. Respondent broke the tie by conducting an interview, and Grievant was not selected for the position. Grievant's challenged the failure of Respondent to award her points in the statutory criteria specialized training and evaluations. Grievant's argument that she should have been awarded points in the statutory criterion specialized training failed because Respondent could not, by statute, consider specialized training when none was called for in the job description. Likewise, Respondent could not award Grievant a point in the criterion evaluations, when, as a substitute employee, Grievant had not received any evaluations. Finally, Grievant did not demonstrate that it was arbitrary and capricious for Respondent to break the tie by conducting an interview.

KEYWORDS: Arbitrary and Capricious; Willful Neglect of Duty; Insubordination; Unsatisfactory Performance; Termination; Dismissal

CASE STYLE: Hall v. Grant County Board of Education
DOCKET NO. 2011-1341-GraED (9/19/2012)

PRIMARY ISSUES: Whether Respondent acted in an arbitrary and capricious manner when terminating Grievant's employment.

SUMMARY: Respondent contends that Grievant was terminated from employment for willful neglect of duty and insubordination. In addition, Grievant's conduct was not correctable. Grievant asserts that the allegations supporting the termination more closely resemble a charge of unsatisfactory performance. Grievant argues that, based upon the rapid sequence of events leading to the termination of his employment, his dismissal was contrary to the provisions of W. Va. Code § 18A-2-12 because he was not given an opportunity to improve his performance under an improvement plan.

Grievant was terminated for what amounted to a charge of unsatisfactory performance even though Respondent sought to characterize the charges as insubordination and willful neglect of duty. In addition, the record established that Grievant conduct was correctable, and he was making efforts to improve his work performance. The record also established that Grievant was not provided any improvement plan which might have led to correcting his behavior. Based upon this sequence of events, Grievant's dismissal was contrary to the provisions of W. Va. Code § 18A-2-12 because Grievant was not given a meaningful opportunity to improve his performance under an improvement plan. The Respondent exercised its authority to dismiss Grievant in an unreasonable fashion, and was arbitrary and capricious. This grievance is granted.

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Extra-duty Pay; Extracurricular Pay; Policies
<u>CASE STYLE:</u>	<u>Cook, et al. v. Lincoln County Board of Education</u> DOCKET NO. 2012-0224-CONS (9/25/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent violated any law or policy in changing Grievant pay.
<u>SUMMARY:</u>	<p>Grievants allege Respondent reduced their compensation for work as Bus Operator Trainers from their extra-duty assignment rate of pay to \$15.00 per hour without their consent or notice and opportunity for hearing. The Bus Operator Trainer position was posted as an extracurricular assignment for \$15.00 per hour. After Grievants were awarded positions as Bus Operator Trainers, they were instead paid the higher extra-duty rate for approximately eight months, at which time Respondent asserts it became aware of this mistake in pay and corrected the pay to the posted amount. Grievants argue Respondent violated the statute regarding transferring school personnel. Respondent did not violate this statute as Grievants were not transferred. Grievants also argue that the non-regulation clause prevents Respondent from reducing Grievants rate of pay. Respondent did not violate the non-regulation clause. There was no reduction in rate of pay because the rate of pay was \$15.00 per hour as per the posting, not the pay actually received, and \$15.00 per hour is the pay to which Grievants consented and were entitled. Respondent asserts the payment of the higher extra-duty pay was simply a clerical mistake. Grievants argue that it was the posting and the contract that were the mistakes, and not the pay. However, Grievants failed to prove this contention by a preponderance of the evidence and failed to present legal argument as to how Respondent violated law or policy in doing so.</p>

KEYWORDS: Insubordination; Absenteeism; Improvement Plan; Evaluation; Discrimination; Harassment

CASE STYLE: Breck v. Putnam County Board of Education
DOCKET NO. 2011-1541-PutED (9/25/2012)

PRIMARY ISSUES: Whether Respondent's evaluation of Grievant was arbitrary and capricious and whether Respondent harassed or discriminated against Grievant.

SUMMARY: Grievant is employed as a HVAC II/General Maintenance by Respondent, Putnam County Board of Education. Grievant's job requires him to change and clean HVAC filters at the Respondent's facilities throughout the county. Grievant was involved in an argument with his supervisor on March 25, 2011, which resulted in Grievant being suspended without pay for ten days for insubordination. Upon his return to work on April 11, 2011, the Assistant Superintendent performed Grievant's yearly performance evaluation, noting four areas of deficiency, and placed Grievant on an improvement plan. Grievant disagreed with his evaluation, denying the alleged deficiencies. Grievant alleged the evaluation and improvement plan were not based upon the facts, were unfair, and unjustified. Grievant also asserted claims of discrimination and harassment. Grievant failed to meet his burden of proving that his evaluation was flawed or arbitrary and capricious. Further, Grievant failed to meet his burden of proving his harassment and discrimination claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Shift Change; Assignment; Transfer; Reason; Rescind; Arbitrary and Capricious

CASE STYLE: Santy v. Marion County Board of Education
DOCKET NO. 2012-1010-MrnED (9/12/2012)

PRIMARY ISSUES: Whether Respondent exercised its broad discretion in an arbitrary and capricious manner in changing Grievant's shift, and whether the reason for the transfer ceased to exist.

SUMMARY: Grievant is employed by Respondent as a Maintenance Foreman. He has also held the position of Clerk of the Works for some period of time for a building construction project. Respondent placed Grievant on transfer so that his shift could be changed from day shift to evening shift, in order to allow him to better monitor the work of the evening custodians. Prior to August 1, Grievant was awarded a second Clerk of the Works position for a second major construction project, and the School Building Authority determined that Grievant would not be allowed to work as Maintenance Foreman while he served in this Clerk of the Works position. Grievant will be working varying hours during the next year and a half in this position, as the job requires. The need for the transfer no longer exists.

KEYWORDS: Substitute Position; Temporary Position; Selection; Preferred Recall

CASE STYLE: Swaim v. Morgan County Board of Education
DOCKET NO. 2012-0263-MorED (9/20/2012)

PRIMARY ISSUES: Whether Grievant was entitled to be placed in a substitute position off the preferred recall list ahead of substitute employees.

SUMMARY: Grievant was reduced-in-force and placed on the preferred recall list as an Aide. Grievant believed she was entitled to placement into a substitute Aide/Autism Mentor position ahead of any employee on the substitute employment list, because she was on preferred recall and substitute employment was a temporary position within the meaning of the statute. A substitute position is not a temporary position as that term is used in the preferred recall provisions. Grievant could not be recalled to fill the substitute position ahead of employees on the substitute list.

TOPICAL INDEX
STATE EMPLOYEES

KEYWORDS: Abuse of Sick Leave; Medical Excuse; Secondary Employment; Moot

CASE STYLE: Smith v. Division of Corrections/Lakin Correctional Center
DOCKET NO. 2011-0969-MAPS (9/26/2012)

PRIMARY ISSUES: Whether Respondent proved that Grievant abused her sick leave.

SUMMARY: Respondent suspended Grievant for five days without pay for attending, and receiving pay for, a meeting at her secondary job on a day she claimed sick leave from Respondent. Grievant also worked a full shift for her secondary employer during a period in which she submitted a medical form to Respondent stating that she was unavailable for work due to injury. Grievant argues that she was only attending the meeting to get advice from a co-worker regarding treatment for her injury and that the punishment imposed by Respondent was too severe for any infraction she may have committed.

Respondent proved that the discipline was justified and appropriate. The grievance is DENIED.

KEYWORDS: Dismissal; Arbitrary and Capricious; Hearsay; Termination; Mitigation; Zero Tolerance; Good Cause; Property Interest in Employment

CASE STYLE: Hamilton v. Department of Health and Human Resources/Welch Community Hospital
DOCKET NO. 2011-1785-DHHR (9/6/2012)

PRIMARY ISSUES: Whether Respondent demonstrated good cause in terminating Grievant's employment.

SUMMARY: Grievant was dismissed for misconduct/resident abuse by the misappropriation of resident and hospital property. Grievant was terminated after an investigation was completed regarding allegations that Grievant had removed two small plastic garbage bags of food and drink that belonged to the Facility and one of its residents. Grievant asserts that she was wrongfully terminated. Grievant does not deny that she took a trash bag with four broken or empty soda cans. The only allegation of misappropriation that Respondent could support by a preponderance of the evidence was that Grievant had taken one small trash bag that was the property of Respondent. While Grievant admittedly misappropriated the bag in violation of Respondent's policy, this violation was not of a substantial nature and did not to justify the termination of her employment given her eleven years of satisfactory work at Golden Harvest. Mitigation is warranted under these facts. Given the totality of the circumstances, the punishment of dismissal was disproportionate to the offense. This grievance is granted in part and denied in part.

KEYWORDS: Dismissal; Good Cause; Policies

CASE STYLE: Sutphin v. Department of Health and Human Resources/Bureau for Child Support Enforcement
DOCKET NO. 2011-1808-DHHR (9/10/2012)

PRIMARY ISSUES: Whether Respondent proved grievant violate law and policy by aiding her son to receive benefits and making benefit determinations on her neighbor's application.

SUMMARY: Grievant was dismissed from employment as a family support specialist for allegedly working on cases for public support which involved her neighbors and for intentionally assisting her son to receive benefits for which he was not qualified. These activities are specifically prohibited by DHHR policy. Grievant admitted that she worked on cases where her neighbors were involved but argued that the neighbors were not her friends. Grievant denies assisting her son in receiving improper benefits. Respondent proved that Grievant violated DHHR policy by working on her neighbor's case but failed to prove that she assisted her son in receiving overpayment in benefits. The grievance is GRANTED in part and DENIED in part.

KEYWORDS: Dismissal; Misconduct; Drug Testing; Good Cause

CASE STYLE: Smith v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2011-0799-DHHR (9/6/2012)

PRIMARY ISSUES: Whether Respondent properly dismissed Grievant from his job as a registered nurse when he tested positive for marijuana in work-related drug test.

SUMMARY: Grievant was dismissed after he tested positive for the presence of marijuana in his body system while he was at the workplace. Grievant argues that there was not a sufficient reason to require him to submit to a drug test, the urine sample was not correctly collected and that dismissal was too severe under all the circumstances of the case. Grievant was observed by three co-workers having extreme difficulty staying awake. While there may have been non-drug related reasons for this behavior, it created a reasonable basis for the drug testing. Respondent proved that there was no reasonable possibility that the sample was tampered with and Respondent did not abuse its discretion in choosing to dismiss Grievant rather than impose a lesser penalty. Consequently, the grievance is DENIED.

<u>KEYWORDS:</u>	Favoritism, Discrimination; Moot; Advisory Opinion
<u>CASE STYLE:</u>	<u>Elliott v. Division of Corrections/Northern Correctional Center</u> DOCKET NO. 2011-1457-MAPS (9/19/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievant is entitled to a 5% pay increase. Whether Respondent acted in a discriminating manner.
<u>SUMMARY:</u>	The Grievance Board has long held that mistake does not constitute discrimination nor does it bind Respondents to continue to make further mistakes with Grievant. In addition, the undersigned is without authority, under any reading of the facts in this grievance, to grant the request for a 5% pay increase.
<u>KEYWORDS:</u>	Leave Restriction; Pgressive Discipline; Suspension
<u>CASE STYLE:</u>	<u>Sweeney v. Department of Health and Human Resources/Bureau for Public Health</u> DOCKET NO. 2012-0466-CONS (9/12/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent was justified in placing Grievant on leave restriction, requiring him to provide substantiation of sick leave, and suspending him for violating the leave restriction.
<u>SUMMARY:</u>	<p>Grievant filed three grievances that were consolidated for hearing purposes. First, Grievant grieved the denial of a particular request for annual leave. As relief, Grievant sought the elimination of "improper leave restriction" and for Respondent to formulate specific policy. That grievance must be dismissed as there is no order the undersigned could issue to the Respondent towards "eliminating improper restriction on leave use" that would not be speculative or advisory, and the undersigned has no authority to order the agency to draft policy. Second, Grievant asserts Respondent later improperly placed him on leave restriction without good cause and for an indefinite period. That grievance must also be dismissed as moot as Respondent has now removed the leave restriction. Last, Respondent was justified in placing Grievant on leave restriction due to his absence history, was justified in requiring Grievant to provide substantiation of his absence while on leave restriction, and was justified in suspending him when he failed to provide the required substantiation after already receiving a written reprimand for other violation of his leave restriction.</p> <p>Accordingly, the grievance is denied.</p>

<u>KEYWORDS:</u>	Policies; Payment Agreement; Revocation Hearing; Incorrect or Inaccurate Evidence
<u>CASE STYLE:</u>	<u>Yates v. Tax Department</u> DOCKET NO. 2011-1703-DOR (9/24/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievant's actions warranted a written reprimand.
<u>SUMMARY:</u>	Grievant was issued a written reprimand for failing to bring supporting documents to a business registration revocation hearing before the West Virginia Office of Tax Appeals. In addition, he was given the reprimand for giving false or misleading testimony under oath at the hearing. Respondent met its burden of proof and demonstrated the charges against Grievant by a preponderance of the evidence.
<u>KEYWORDS:</u>	Resident Abuse or Neglect; Improperly Restraining; Dignity; Privacy; Rules and Regulations
<u>CASE STYLE:</u>	<u>Forren v. Department of Health and Human Resources/Jackie Withrow Hospital</u> DOCKET NO. 2012-0495-DHHR (9/20/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved that Grievant violated rules and regulations related to seclusion, restraint and dignity of long-term treatment facility residents.
<u>SUMMARY:</u>	Grievant was dismissed for allegedly placing a resident in a restraining chair and confining another resident to her room, both without proper authorization. She was also charged with violating a resident's right to be treated with dignity by removing a male resident's gown in the hallway, in the presence of other residents and staff, so that the gown could be adjusted. Grievant denied two of the allegations. Grievant alleged that she placed one resident in a feeding chair to prevent a confrontation with another resident. She argued that was not a restraint because the resident was able to free herself from the chair. She alleged that the second resident was not confined to her room and was actually in the hall during the evening. Respondent proved the charges that led to Grievant's dismissal and the grievance is DENIED.

KEYWORDS: Temporary classification upgrade; policies

CASE STYLE: Coleman v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital and Division of Personnel
DOCKET NO. 2011-0050-CONS (9/21/2012)

PRIMARY ISSUES: Whether Grievant was eligible for a temporary upgrade.

SUMMARY: Grievant is classified as a Security Guard and assigned to work at the William R. Sharpe, Jr. Hospital. A forensic patient of Sharpe Hospital was housed in the Forensics Evaluation Unit (a four bed Department of Health and Human Resources facility at the South Central Regional Jail). On April 29, 2010, an Order was entered by the presiding circuit court judge which required Respondent to provide court-ordered supervision. Sometime in May 2010, the community reintegration phase for the patient began, and Grievant spent approximately two to four days escorting the patient to restaurants, movie theaters, etc., in an effort to reintegrate the patient into society. Due to the limited amount of time spent performing the duties; a temporary upgrade was unavailable as relief. This grievance is denied.

<u>KEYWORDS:</u>	Termination; Dismissal; Insubordination
<u>CASE STYLE:</u>	<u>Phillips v. Division of Corrections/Mount Olive Correctional Complex</u> DOCKET NO. 2012-0373-MAPS (9/11/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent's actions in terminating Grievant was lawful and/or disproportionate or excessive.
<u>SUMMARY:</u>	<p>Grievant was dismissed from employment with Respondent for his failure to comply with a mandatory directive to report to a shift commander at the end of regular scheduled shifts for potential overtime assignment and failing to submit required documentation of leave time. Various safety constraints and applicable regulations require that Respondent compel employee to work overtime to cover staff shortages from time to time. While such administrative actions are a recognized authority of this employer, implementation of compulsory overtime has been a point of contention with some personnel. Grievant did not demonstrate that he should not have been punished for his failure to comply with the directive in effect during the time period relevant to this matter.</p> <p>Respondent established essential facts by a preponderance of the evidence. Respondent proved by a preponderance of the evidence that Grievant was aware of the obligation to report to the Shift Commander for possible overtime and Grievant did not report to appropriate supervisory personnel at the conclusion of his duties. In light of Grievant's previous disciplinary and work history, which included four separate suspensions for unauthorized absences and a written reprimand for calling off when scheduled for mandatory overtime, Respondent's decision to terminate Grievant is not found to be unreasonable or excessive. Accordingly this grievance is DENIED.</p>

<u>KEYWORDS:</u>	Timeliness; Non-Selection; Moot; Controversy; Advisory Opinion
<u>CASE STYLE:</u>	<u>Williams v. Division of Corrections/Denmar Correctional Center</u> DOCKET NO. 2011-1488-MAPS (9/7/2012)
<u>PRIMARY ISSUES:</u>	Whether this grievance was timely filed, and whether it is moot as Grievant prevailed in part at level one and did not grieve his second non-selection.
<u>SUMMARY:</u>	Grievant filed a grievance challenging his non-selection for a position. At Level One, it was found that an error was made during the selection process. Therefore, Grievant prevailed, in part, at Level One. Respondent was ordered to rescind its original selection and to go through the selection process again. Respondent complied with that order. However, Grievant was again not selected for the position. Grievant did not grieve his second non-selection. Because the relief ordered at Level One was implemented, and as Grievant failed to grieve his second non-selection, no live controversy exists in this matter. Therefore, this grievance is moot. Accordingly, Respondent's Motion to Dismiss should be granted and this grievance, DISMISSED.